

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 3-97:

CUT BANK EDUCATION ASSOCIATION,)	
MEA, NEA,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
CUT BANK PUBLIC SCHOOLS,)	AND RECOMMENDED ORDER
)	
Respondent.)	

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I. INTRODUCTION

By stipulated agreement, an in-person hearing was conducted by Gordon D. Bruce in the above entitled matter in Cut Bank, Montana, on May 1, 1997. Petitioner, Cut Bank Education Association, MEA/NEA, appeared with counsel, Richard A. Larson. Respondent, Cut Bank Public Schools, was represented by Arlyn L. Plowman, Montana School Board Association. Joint Exhibits J-1 through J-8, Respondent’s Exhibits E-1 through E-5, and Petitioner’s Exhibits A through L were admitted into evidence on the record. Tina Gauthier, the affected employee in this action, gave sworn testimony as did Dennis Roseleip, Superintendent, Cut Bank Public Schools (CBPS); Scott Laird, Business Manager/Clerk, CBPS; and Don Paulson, Counselor, Cut Bank High School.

By agreement, final arguments were filed with the Hearing Officer on June 18, 1997 at which time the record was closed and the matter deemed fully submitted for determination.

II. BACKGROUND

The Petitioner, Cut Bank Education Association, MEA/NEA, filed a petition for unit clarification with the Board of Personnel Appeals on October 28, 1996. The petition sought to amend the current recognized bargaining unit to include Ms. Gauthier, who instructs sixth graders for 4 1/2 weeks in a study skills program. The petition also requested that Tina Gauthier be offered a professional teacher's contract.

Cut Bank Public Schools or the District (Respondent), responded to the petition in a November 13, 1996 letter by Dennis Roseleip, District Superintendent. That response noted that Tina Gauthier serves as an "At-Risk" Tutor supervised by the Middle School Counselor. Further, the Respondent asserted that the Office of Public Instruction or the Board of Public Education, rather than the Board of Personnel Appeals, has jurisdiction to interpret and enforce Section 20-4-201, MCA. Respondent further contends that:

- 1) Tina Gauthier, subject of this Unit Clarification, is an "At-Risk" Tutor and as such, is not and has not been a member of the bargaining unit represented by the Cut Bank Education Association; and
- 2) Ms. Gauthier is employed and compensated pursuant to the District's policies affecting non-teaching classified personnel in a position dependent upon funding from federal sources through Carl Perkins Grant Programs.

Finally, the Respondent contends that:

Tina Gauthier is not employed as a teacher. Therefore, she has insufficient community of interest with district employees hired under teaching contracts pursuant to Section 20-4-201, MCA, to be added to a bargaining unit limited to employees hired under teaching contracts.

III. ISSUE

The parties stipulated that the question before the Hearing Officer is:

- 1) Whether the Board of Personnel Appeals has jurisdiction to interpret and administer the provisions of Montana Code Annotated Title 20, Chapter 4; and
- 2) Whether Tina Gauthier, an "at-risk" tutor and a classified employee, should be added to an existing bargaining unit composed of employees under teaching contracts as required by Section 20-4-204, MCA.

IV. CLARIFICATION

At the beginning of the hearing, the parties stipulated that the petition addressed only the *one-hour per day* that Ms. Gauthier serves as a study skills instructor.

V. FINDINGS OF FACT¹

Uncontested Facts:

1. Ms. Gauthier is employed and compensated pursuant to the District's policies affecting non-teaching classified personnel in a position dependent upon funding from federal sources through Carl Perkins Grant Programs.

Additional Facts:

2. At all times relevant to this petition, the Petitioner and Respondent School District were parties to a collective bargaining agreement (Exhibit E-1). Section 5 of that collective

¹All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings, conclusions and arguments may have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

bargaining agreement page 1, Exhibit E-1) defined the bargaining unit as follows:

This unit being composed of all certificated or licensed teaching personnel under current contract, with the exception of the Superintendent and Principals.

3. Ms. Gauthier has been employed by Respondent for several years. During the 1996-97 school year, Ms. Gauthier provided tutoring services and for one class period each day taught a study skills course at Cut Bank Middle School. (Testimony Mr. Roseleip and Ms. Gauthier)

4. Ms. Gauthier's position is fully funded with federal grants and is a prevention and intervention program dedicated to helping "at-risk" students and preventing students from becoming "at-risk." It is coincidental that Ms. Gauthier possesses a teaching certificate since no such certificate is required for her position. (Testimony Dennis Roseleip and Don Paulson)

5. The position held by Ms. Gauthier does not require certification or licensure, and she is employed by the Cut Bank Public Schools as an "At-Risk" Tutor for students in grades six through twelve. Her duties include instructing sixth grade students in a 4 /2 week study skills program for one-hour per day. (Testimony Ms. Gauthier and Mr. Roseleip)

6. She receives wages and benefits as a classified/support employee and shares working conditions with the support staff/classified employees. She is not required to attend faculty meetings or perform faculty functions/duties. (Testimony Mr. Roseleip and Mr. Laird)

7. Ms. Gauthier will not be assigned study skills instruction responsibilities for the 1997-98 school year. Study skills instruction will be provided by eleven advisee/volunteers who may or may not be certificated or licensed and could include a full range of personnel including custodians and other non-instructional employees/volunteers. (Exhibit E-6)

8. Ms. Gauthier earns \$8.30 per hour for a seven hour day (Testimony Ms. Gauthier). She is employed and compensated pursuant to the District's policies affecting non-

teaching classified and support personnel, and she received the notice of nonrenewal policy applicable to the non-teaching personnel. (Testimony Mr. Roseleip and Mr. Laird). Teachers, however, are covered by the collective bargaining agreement (Exhibit E-1, Appendix B), and are compensated on an annual salary basis that considerably exceeds that of Ms. Gauthier. She receives approximately \$10,458.00 annually (\$8.30 an hour x 7 hours each workday for about 180 days each year).

9. Teachers covered by the collective bargaining agreement (Hereafter “Teachers”) (Exhibit E-1), are not paid for school holidays. Tina Gauthier, as a classified/support staff employee, receives paid holidays pursuant to Sections 2-18-603, MCA. (Testimony Mr. Roseleip and Mr. Laird)

10. Teachers earn 12 days of sick leave per year, with a maximum accumulation of 100 days which may be cashed out after ten years of service at one-half of the substitute rate. (See Section 9, page 5, Exhibit E-1)

11. As a non-teaching school district employee identified in Section 2-18-601(4), MCA, Tina Gauthier earns and uses sick leave at the rate of 12 days for a 2080 hour year with unlimited accrual and one-quarter pay cash out upon termination after a 90-day qualifying period. Accordingly, Ms. Gauthier does not accrue sick leave as quickly as teachers covered by the collective bargaining agreement, but her accumulation is unlimited and she is eligible for a lump-sum payment after a much shorter qualifying period (90 days vs. 10 years) at a much higher rate. (See Section 2-18-618, MCA) (Testimony Mr. Laird and Exhibits E-5a through E-5i)

12. Teachers are supervised by their respective Principal. Tina Gauthier is supervised by Middle School Counselor, Don Paulson, who is not a Principal. Mr. Paulson does not supervise any teachers. (Testimony Mr. Paulson)

13. Teachers have individual teacher contracts pursuant to Section 20-4-201, MCA, and may be eligible for tenure. Tina Gauthier does not have an individual employment contract and is not eligible for tenure. (Testimony Mr. Roseleip)

14. Respondent assigns certain duties such as hall supervision, dance chaperoning, and morning lobby supervision duties. Ms. Gauthier performed a similar duty for three days, three years ago; however, teachers perform these duties for three or more days several times per year. (Testimony Ms. Gauthier and Mr. Roseleip)

15. Respondent evaluates prior to March 1, but usually evaluates support/ classified personnel, including Tina Gauthier, nearer the end of the school year. (Testimony Mr. Roseleip)

16. Teachers have to pay \$48.20 per month to participate in the District's group insurance plan. As an "At-Risk" Tutor, Ms. Gauthier would be required to pay \$126.00 per month if she participated in the same insurance plan. (Exhibit E-1, p. 10 and Testimony Mr. Laird)

17. Teachers usually teach and prepare courses that last at least a full semester if not all year. These courses require a certified/licensed teacher pursuant to the Office of Public Instruction/Board of Public Education rules and regulations. Ms. Gauthier instructs a study skill program which only lasts for 4 1/2 half weeks and is repeated eight times per year in a position that does not require licensure/certification. (Testimony Mr. Roseleip)

18. The District may have treated Tina Gauthier like a teacher in certain respects, because she was subject to the District's "Teacher Professional Growth Program" and received

periodic evaluations that were a part of that program (Testimony Ms. Gauthier). A substantial difference is that Respondent requires teachers to work 187 days per year, including seven pupil instruction related days and Ms. Gauthier is not subject to that requirement. (Testimony Mr. Roseleip)

19. Ms. Gauthier assigned grades (Testimony Ms. Gauthier and Exhibit L) and Respondent requires her to prepare materials for a substitute teacher (see Exhibit K) in the event of her absence from the class (Testimony Ms. Gauthier) but unlike teachers, Respondent did not require Ms. Gauthier to work on pupil instruction related days or attend pupil instruction related activities. For example, Respondent releases her at noon on the last day of school and does not require her to participate with teachers in their PIR activities that afternoon. Nor does Respondent require her to attend the two preschool pupil instruction related days. (Testimony Mr. Roseleip)

20. Respondent has several non-teaching employees in addition to Tina Gauthier who possess teacher certification/licensure. Respondent does not employ these non-teaching certificated/licensed personnel as teachers nor consider or treat them as teachers. (Testimony Mr. Roseleip)

21. Respondent lists Ms. Gauthier with other non-teaching personnel in Petitioner Exhibits B, (“*Schools In Focus*”) which provides the “latest up-to-date information from teachers, coaches and *other staff*” to parents of students. Respondent includes tutoring in class schedules and school agenda (Exhibit I), and the *Cougar Hotline* (See Exhibit F); however, Respondent does not list Ms. Gauthier in any of these materials as a member of the *Faculty* for the 1996-1997 school year. (Exhibit E-4c)

22. Study skills instruction is not funded by the District's general fund. Study skills instruction, like the rest of the "At-Risk" Tutor Program is dependent upon federal funds as are several vocational programs offered by the District such as shop and home economics. Unlike the "At-Risk" Program, however, vocational instruction is not totally dependent upon federal money and is funded using different allocations and criteria. (Testimony Mr. Roseleip)

23. The Office of Public Instruction and the Board of Public Education have established certification and accreditation standards for the vocational education programs partially funded by federal dollars. The Office of Public Instruction/Board of Public Education have not established similar certification or accreditation criteria for "At-Risk" Tutor Programs including study skills which is wholly dependent upon federal money. (Testimony Mr. Roseleip)

VI. DISCUSSION

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals (hereafter Board) following federal court and National Labor Relations Board (hereafter NLRB) precedence as guidelines for interpreting the Montana Collective Bargaining For Public Employees Act. (*State ex rel Board of Personnel Appeals vs. District Court*, 183 Mont. 223 (1979), 598 P.2d 1117)

Section 39-31-303, MCA, requires that public employees and their representatives recognize the prerogative of public employers to determine the job classifications and personnel by which government operations are to be conducted. Respondent argues that this implies the Board of Personnel Appeals has no authority to dictate to the School District the means, job classifications or personnel by which the study skills instruction is to be performed. Respondent cites Section 20-4-201, MCA, in the proposition that the trustees of the district shall have the authority to employ any person who holds the proper credentials to perform the duties prescribed

by the trustees. Pursuant to the statute, it appears the trustees have authority to determine *that study skills instruction does not require certification or licensure*.

Respondent then contends that any disagreement with the trustees' decision must be pursued with the County Superintendent, the Office of Public Instruction or the Board of Education who have jurisdiction over Title 20 of the Montana Code Annotated because Section 20-3-210 and 20-3-107, MCA, give the County Superintendent of Schools and the State Superintendent of Public Instruction exclusive jurisdiction over all questions or issues arising out of Title 20 of the Montana Code Annotated. Here too, based on the statute, the State Superintendent of Public Instruction has the authority and jurisdiction to *determine whether Tina Gauthier should be issued a teaching contract*.

Notwithstanding Respondent's arguments on jurisdiction concerning Title 20, it is clear that pursuant to **Section 39-31-202**, MCA, determinations of the appropriate units for purposes of collective bargaining between Montana public employers and the exclusive representative of public employees are matters properly before the **Board**, and as the District is a public employer under Montana's Collective Bargaining for Public Employees Act ("*Act*"), it is subject to the jurisdiction of the Board for unit clarification purposes.

Taken to its logical conclusion, Respondent's contention--that it has unfettered discretion to categorize employees as it sees fit--would render the Act largely irrelevant. Clearly, the employer cannot arbitrarily exclude anyone (or any position) it chooses from the bargaining unit, as it is the Board's *express* responsibility under the Act to ensure that an appropriate bargaining unit is recognized in resolving this dispute. Section 39-31-202 MCA, provides the following "community of interest" factors:

In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and *shall consider such factors as community of interest, wages, hours, fringe benefits, and working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.* (emphasis added)

See also, A.R.M. 24.26.630, Petitions for unit clarification of bargaining unit.

Respondent cites *Wallace-Murray Corporation*, 192 NLRB No. 160, 78 LRRM (1046) (1971) in support of its argument that this case should be dismissed because there have been no recent changes in Ms. Gauthier's duties and responsibilities. In *Wallace-Murray*, however, the matter was dismissed *without prejudice*, the NLRB stating: "Accordingly, without prejudice to the filing of a clarification petition at an appropriate time, we hereby dismiss the Employer's petition herein."

Further, in *Wallace-Murray*, the facts were significantly different:

From 1937 to 1943 the parties executed collective-bargaining agreements covering such unit, specifically excluding 'watchmen'. However, in their 1943 contract and in all subsequent contracts, the parties have specifically included 'watchmen' in the contract unit. In the 1967 agreement the parties, for the first time, made reference to the watchmen as 'guards,' and this terminology was carried over to the current(1970 through 1973) collective-bargaining agreement. The parties stipulate that the 'guards' in question (formerly referred to as watchmen) are in fact guards....

In the instant case, we clearly have a petition filed by Ms. Gauthier for unit clarification under circumstances and facts unlike those found in *Wallace-Murray*. The case is therefore not dispositive of this matter, and dismissal on grounds is not warranted based on the overall record pertinent to Ms. Gauthier's petition.

Here, the statutory criteria, including "community of interest," have considerable significance in weighing all the factors which must be considered in establishing an appropriate

unit. Decisions of the National Labor Relations Board, including *Armstrong Rubber Co.*, 144 NLRB 1153, 49 LRRM 1956 ((1963), *Budd Co.*, 136 B/LRB 1153m 49 LRM 1956 (1963); see also *NLRB v Lundy Packing Company*, 150 LRRM 2705, 68 F.3d 1577 and *Safeway Store, Inc.*, 256 NLRB 918, 107 LRRM 1338 (1981), dictate a community of interest test.

Certain factors on the record reflect a community of interest in this case; however, many substantive factors contained in the above findings clearly point to a contrary result, including the following:

Ms. Gauthier's compensation is substantially less at an hourly wage of \$8.30 per hour or about \$10,807 per year compared to \$18,230 to \$41,330 paid to teachers.

Bargaining unit members are hired under individual employment contracts and hold positions which require certification or licensure.

Ms. Gauthier earns annual/vacation leave pursuant to state statute while teachers do not and unlike teachers, she has a different cash-out of accumulated sick leave.

Respondent requires teachers to attend pupil instructed activities but does not require Ms. Gauthier to do so; teachers have duties not shared by Ms. Gauthier, and teachers may obtain tenure under their contract which is not available to Ms. Gauthier.

Notwithstanding that certain factors reflect some community of interest, the overall record reflects that Ms. Gauthier lacks the necessary community of interest with members of the bargaining unit. Moreover, NLRB standards appear to require that if employees are to be added to a bargaining unit, there must be an overwhelming community of interest with the preexisting unit. The NLRB has stated, in *NLRB v Lundy Packing Company*, 150 LRRM 2705, 68 F.3d 1577 (1995), that in accretion cases new employees can be added to an existing bargaining unit "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted."

VII. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction to consider this petition pursuant to Section 39-31-202, MCA.

2. Here, Ms. Gauthier does not have the requisite community of interest with the members of the Petitioner union to include her position in the bargaining unit.

VIII. RECOMMENDED ORDER

Pursuant to ARM 24.26.630(5)(b), the petition for unit clarification is **Denied**.

DATED this ___ day of August, 1997.

BOARD OF PERSONNEL APPEALS

By:

Gordon D. Bruce
Hearing Officer